Supreme Court, U.S.
FILED
OCT 13 2009
OFFICE OF THE CLERK

No. 09-176

IN THE

Supreme Court of the United States

LEA LAKESIDE-SCOTT,

Petitioner,

v.

JANN BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

JENNY M. MORF
Assistant County Attorney
501 SE Hawthorne, Suite 500
Portland, OR 97214
Telephone: (503) 988-3138
Facsimile: (503) 988-3377

Attorney for Respondent

225741

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Should petitioner be granted certiorari on an adverse employment action that was not a basis of liability in the proceedings below?

2. Does the first part of the two-part burden shifting framework articulated in *Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) require a plaintiff/employee to prove causation between her discharge from employment and an individually named defendant/supervisor's alleged retaliatory animus?

3. Should petitioner be granted certiorari on an issue that the majority opinion did not reach?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES iii

STATUTES INVOLVED IN THE CASE 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION ... 2

I. The Petition Should Be Denied Because Scott Seeks Certiorari On An Adverse Employment Action That Was Not Presented To The Jury Or On Appeal. .. 3

II. Certiorari Is Not Approriate Because The Mt. Healthy Standard Was Properly Applied. 5

III. Review Of The Mt. Healthy Affirmative Defense Should Not Be Granted Because The Court Did Not Reach That Issue. .. 7

CONCLUSION 9

TABLE OF CITED AUTHORITIES

Page

Cases:

Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668 (1996) 6

Coszalter v. City of Salem, 320 F.3d 968 (9th Cir. 2003) 6

Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008) 3

Garcetti v. Ceballos, 547 U.S. 410 (2006) 6

Lakeside-Scott v. Multnomah County, 556 F.3d 797 (9th Cir. 2009) 2, 5, 6, 7, 8

Marable v. Nitchman, 511 F.3d 924 (9th Cir. 2007) 6

Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle, 429 U.S. 274 (1977) 3, 5, 6, 7, 8

Settlegoode v. Portland Pub. Schs., 371 F.3d 503 (9th Cir. 2004) 6

Singleton v. Wulff, 96 S. Ct. 2868 (1976) 3

STATUTES INVOLVED IN THE CASE

Contrary to Scott's statement, the Oregon Revised Statutes are not at issue in this appeal. (Judgment dated July 29, 2005).

STATEMENT OF THE CASE

The Statement of Facts submitted by Scott includes irrelevant and argumentative facts regarding the speech and adverse employment actions at issue. Brown restates the background facts articulated by the Ninth Circuit in its Opinion and offers the following:

Scott was discharged from her job as a computer information systems specialist after an investigation revealed that she had improperly accessed and used the computers and email systems of her employer, Multnomah County. The discharge decision was made by Joanne Fuller ("Fuller"), the Director of the County's information systems department. In the proceedings below, Fuller and others reiterated that Brown played no role in Fuller's decision to discharge. (Excerpts of Trial Transcript pp. 177, 181, 182, 189, 209 and 210). Scott did not offer contrary evidence. Fuller ended Scott's employment because the magnitude of Scott's misconduct was on a scale that was completely different from what Fuller had seen in other employees and destroyed her ability to trust Scott to uphold the County's policies in the future.

Prior to discharge, Scott had filed a complaint with the Oregon Bureau of Labor and Industries ("BOLI") criticizing County operations and Jann Brown, an

intermediate supervisor between Scott and Fuller. After Scott was discharged she filed suit alleging that Brown discharged her in retaliation for her filing the BOLI complaint. The lawsuit contained other causes of action, adverse employment actions, and defendants; however, the only claim at issue on appeal is a First Amendment retaliation claim alleging that Brown discharged Scott for filing the BOLI complaint.

The First Amendment claim went to trial and the jury returned a verdict in Scott's favor. The trial court denied Brown's renewed motion for judgment as a matter of law ("JMOL"), and Brown appealed to the Ninth Circuit. The Ninth Circuit reversed and remanded for entry of judgment in Brown's favor because "there was insufficient evidence to support the verdict against Brown, given the evidence that it was Fuller's independent decision to terminate Scott." *Lakeside-Scott v. Multnomah County*, 556 F.3d 797, 800 (9th Cir. 2009) (App 3). Scott now requests a writ of certiorari of the Ninth Circuit's opinion.

REASONS FOR DENYING THE PETITION

The petition should be denied because Scott is seeking review of an adverse employment action that was not the basis for liability in the proceedings below. At trial and on appeal the only adverse employment action at issue was discharge from employment. Now, for the first time, Scott seeks review of "Brown's act in reporting plaintiff for investigation." The parties did not litigate such a claim, and the request for review of this newly articulated claim should not be accepted.

The petition should also be denied because this case is a run-of-the-mine First Amendment retaliation case that failed on causation. On appeal, the court properly applied the two part burden shifting framework established in *Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274 (1977) and found that Scott failed to demonstrate causation between Brown's alleged retaliatory animus and Scott's discharge. In so doing, the court adhered to the established legal precedent.

I. THE PETITION SHOULD BE DENIED BECAUSE SCOTT SEEKS CERTIORARI ON AN ADVERSE EMPLOYMENT ACTION THAT WAS NOT PRESENTED TO THE JURY OR ON APPEAL.

Scott's discharge was the only adverse employment action before the trial court and on appeal. Now, for the first time, Scott argues that "Brown's act in reporting plaintiff for investigation is an adverse act sufficient to constitute a constitutional harm." (Petition at 17). As a general rule, "a federal appellate court does not consider an issue not passed upon below." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2618 (2008) *citing Singleton v. Wulff*, 96 S. Ct. 2868 (1976). Scott seeks review of an employment action that was not litigated. This Court should decline that request.

During trial, the court inquired as to the basis of liability, and Scott's attorney stated that discharge was the adverse employment action at issue:

> THE COURT: So you're left with the discharge as a claim for liability?
>
> MR. FISHER: That's correct.
>
> THE COURT: And other events that you argue demonstrate that liability, but the claim for liability now is only discharge.
>
> MR. FISHER: It has always been that way, at least from the plaintiff's - that was my intention. I thought I had communicated the basis for liability under this claim throughout the case.

(Excerpt from Trial Transcript pp. 303 and 304). In addition, the jury instructions and Order on post-trial motions demonstrate that the only adverse employment action at issue below was Scott's discharge. (App. 67-68 and 74-76). Scott did not make any appeal from the trial court, and limited her arguments in opposition to Brown's appeal to retaliatory discharge. As noted by the Ninth Circuit:

> [w]e limit the scope of our inquiry to Scott's ultimate termination. Although being placed on administrative leave might qualify as an adverse employment action and we have suggested an investigation of an employee might so qualify, *see, e.g., Poland v. Chertoff*,

> 494 F.3d 1174, 1180 (9th Cir. 2007); *Ulrich v. City and County of San Francisco*, 308 F.3d 968, 977 (9th Cir. 2002), Scott neither argued these theories in the district court nor in her briefs on appeal, consistently stating that her retaliatory conduct claim was based solely on her discharge. Accordingly, we do not consider whether initiating the inquiry into Scott's activities or placing her on administrative leave were themselves adverse employment actions for which Brown could be held liable independent of Scott's termination.

Lakeside-Scott v. Multnomah County, 556 F.3d 797, 803 (9th Cir. 2009) (App 23-23, Ftnt 1). If Scott intended to pursue an adverse employment action in addition to discharge, she should have litigated that claim. Scott failed to do so, and the petition should be denied. *Id.*

II. CERTIORARI IS NOT APPRORIATE BECAUSE THE MT. HEALTHY STANDARD WAS PROPERLY APPLIED.

The Ninth Circuit applied *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977) standard to this First Amendment retaliatory discharge claim, and found that "[c]ausation is the dispositive issue." (App at 10). In applying that standard, the court held that:

> [o]n the facts of this case, where the evidence shows 'that a final decision maker made a wholly independent, legitimate decision to discharge the plaintiff, uninfluenced by the

> retaliatory motives of' Brown, we hold that the neutrality of the decisionmaking process eliminated any 'causal' link to Brown's bias.

Lakeside-Scott v. Multnomah County, 556 F.3d 797, 806 (9th Cir. 2009) (*citing Gilbrook v. City of Westminster*, 177 F.3d 839, 855 (9th Cir. 1999) (App at 13-14).

Scott argues that the court improperly shifted the burden of proof to plaintiff. However, Scott fails to recognize that under the *Mt. Healthy* standard it is the plaintiff/employee's burden of proof to demonstrate causation. *Marable v. Nitchman*, 511 F.3d 924, 929 (9th Cir. 2007) (*quoting Coszalter v. City of Salem*, 320 F.3d 968, 973 (9th Cir. 2003), *citing Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 675, 116 S. Ct. 2342, 135 L. Ed. 2d 843 (1996)); *see also Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977); *Settlegoode v. Portland Pub. Schs.*, 371 F.3d 503, 510 (9th Cir. 2004). Only if "the plaintiff makes those showings, then the burden shifts to the defendant to show 'by a preponderance of the evidence that it would have reached the same decision . . . even in the absence of the [plaintiff's] protected conduct.' " *Gilbrook*, 177 F.3d at 854 (*quoting Mt. Healthy*, 429 U.S. at 287). In applying these standards, the court recognized that:

> the ultimate question of the subordinate's liability "is an intensely factual one, the results of which will vary depending on the circumstances," *Ostad*, 327 F.3d at 883

> (*quoting Gilbrook*, 177 F.3d at 855), we hold that Brown cannot be found liable based on her limited involvement in the chain of events that ultimately led to Scott's termination.

Lakeside-Scott v. Multnomah County, 556 F.3d 797, 807 (9th Cir. 2009) (App 16). Here, Scott failed to demonstrate that Brown's conduct was a substantial or motivating factor in the discharge decision, and the retaliatory discharge claim was properly dismissed as a matter of law.

The court did not apply a new or different standard of causation, nor did it alter the *Mt. Healthy* burdens of proof. Scott may disagree with the factual findings of the Court, but any rulings on factual disagreements would have little practical application beyond this case. As such, the petition for certiorari should be denied.

III. REVIEW OF THE MT. HEALTHY AFFIRMATIVE DEFENSE SHOULD NOT BE GRANTED BECAUSE THE COURT DID NOT REACH THAT ISSUE.

Scott seeks review of the concurring opinion's ruling that Brown proved her affirmative defense under the second part of the *Mt. Healthy* burden shifting framework. Review should be denied because the majority opinion did not reach that issue.

The majority opinion ruled that judgment should be entered in favor of Brown because Scott failed to meet her burden of proof in the first part of the two-part burden shifting framework outlined in *Mt. Healthy*.

The majority did not reach the second part of the framework. The concurring opinion adopted the majority's result, but reasoned that Brown should prevail because she met her burden under the second part of the framework stating that:

> I would reverse the jury's verdict under part two, not part one, of the *Mt. Healthy* burden-shifting framework on the ground that, based on the facts presented, Fuller's investigation – and hence Scott's termination – was inevitable.

Lakeside-Scott v. Multnomah County, 556 F.3d 797, 815 (9th Cir. 2009) (App 36). Scott requests review of the concurring opinion and argues that the facts were misapplied. Certiorari should not be granted on this basis because the majority opinion did not reach the second part of the *Mt. Healthy* framework, and there is no ruling for this Court to review. Furthermore, even if the concurring opinion was appropriate for review, the court applied the proper legal standard and any alleged erroneous factual findings would not have any significance beyond this case.

CONCLUSION

For the reasons stated above, the petition for a *writ of certiorari* should be denied.

Respectfully submitted,

JENNY M. MORF
Assistant County Attorney
501 SE Hawthorne, Suite 500
Portland, OR 97214
Telephone: (503) 988-3138
Facsimile: (503) 988-3377

Attorney for Respondent